

NANCY TILLMAN KEIL
v.
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-74-A

Decided December 19, 1991

Appeal from a decision of the Muskogee Area Director, Bureau of Indian Affairs, declining to acquire land in restricted fee status for an Osage Indian.

Affirmed.

1. Indians: Lands: Individual Trust and Restricted Land: Generally--
Indians: Lands: Trust Acquisitions

In evaluating an application for acquisition of land in restricted fee status under 25 CFR 117.8, which lacks evaluation criteria, the Bureau of Indian Affairs reasonably employed as guidelines the criteria for acquisition of land in trust status listed in 25 CFR 151.10.

2. Board of Indian Appeals: Jurisdiction--Indians: Lands: Individual Trust and Restricted Land: Generally

The approval of requests to acquire land in restricted fee status for Osage Indians is committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

APPEARANCES: M. Allen Core, Esq., Tulsa, Oklahoma, for appellant; M. Sharon Blackwell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Nancy Tillman Keil seeks review of a March 8, 1991, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director;

BIA), declining to acquire land in restricted fee status for appellant's benefit. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant is an Osage Indian of 3/4 degree Osage blood. In January 1989, she sought approval from the Superintendent, Osage Agency, BIA, to sell a 1.25-acre tract of her restricted land near Fairfax, Oklahoma, and to use the proceeds to acquire a 0.248-acre tract of land in Tulsa, Osage County, Oklahoma, in restricted fee status. Appellant apparently intended to use the land in Tulsa for a smoke shop. The Superintendent denied her application on March 17, 1989. She did not appeal the denial.

In October 1989, appellant submitted a new application to sell her 1.25-acre tract and to purchase in restricted fee status a 0.4752-acre tract in Tulsa, Osage County, Oklahoma. She stated that she intended to use the new property for the purpose of a retail business for the sale of, *inter alia*, arts and crafts. The documents submitted with the application showed that she would sell her property for \$1,500 and purchase the new property for the same amount. A February 1989 appraisal conducted by BIA valued appellant's property at \$625. A January 1990 BIA appraisal valued the property appellant sought to purchase at \$10,350.

On April 18, 1990, the Superintendent approved appellant's application to sell her property. However, on August 1, 1990, he disapproved her application to purchase the new property in restricted fee status, stating, "In accordance with current policy * * * this office will not place land in restricted status, either by purchase or exchange unless the application reflects that the desired property will be used for a personal residence, pasture or farmland."

Appellant appealed the denial to the Area Director who, on December 6, 1990, vacated the Superintendent's decision and remanded the matter because the Superintendent had "not identif[ied] the criteria or rationale used in considering [appellant's] request." The Area Director continued:

Although the regulations in 25 CFR [Part] 151 specifically address the acquisition of land in a trust (as opposed to restricted) status, it would appear reasonable to evaluate a request for a restricted acquisition upon the factors set forth in [section] 151.10, [1/] with proof of consideration being reflected in the administrative record. These are also

1/ 25 CFR 151.10 provides:

"In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

"(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

"(b) The need of the individual Indian or the tribe for additional land;

the criteria most readily available and familiar to applicants wishing to acquire land in trust or restricted status.

(Area Director's Dec. 6, 1990, Decision at 3).

By memorandum of February 1, 1991, the Superintendent recommended to the Area Director that the acquisition request be approved. 2/ He stated:

This is a departure from my previous position. The reason being, that the Osage Tribal council has passed a resolution, No. 28-67, requesting support from my office in allowing individual restricted property [to] be acquired by members of the Osage Tribe for legitimate business purposes. Also, we have a letter from the Principal Chief, requesting that we honor all requests for placing property in restricted status. This action will not affect any governmental agency and the land will remain on the tax rolls.

On March 8, 1991, the Area Director denied appellant's application, stating in part:

Based on our analysis of the application, * * * using the criteria found under 25 CFR 151.10 as a guideline and the record as submitted, we find that there is insufficient need for Ms. Keil to acquire the property in restricted status (25 CFR 151.10(b)); she has not demonstrated a need for federal assistance in managing her affairs (25 CFR 151.10(d)); and most significantly, there is the potential for jurisdictional conflicts in the areas of law enforcement and land use (25 CFR 151.10(f)).

(Area Director's Mar. 8, 1991, Decision at 2).

fn. 1 (continued)

“(c) The purposes for which the land will be used;

“(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

“(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

“(f) Jurisdictional problems and potential conflicts of land use which may arise; and

“(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.”

2/ In remanding the matter, the Area Director directed the Superintendent to submit the acquisition request to the Area Office for review prior to issuing a decision, pursuant to a July 27, 1989, memorandum issued by the Area Director, which “request[ed] that advance notice be given this office of all decisions to approve restricted land acquisitions for individuals.”

Appellant's appeal from this decision was received by the Board on April 8, 1991. Appellant and the Area Director filed briefs.

Discussion and Conclusions

Appellant argues that (1) the Area Director should not have used the criteria in 25 CFR 151.10 to evaluate appellant's application; (2) if it was proper to use the criteria in 25 CFR 151.10, the Area Director failed to consider all the criteria; and (3) the Area Director reached an incorrect conclusion of law, i.e., that the Osage Reservation has been disestablished.

Appellant's application was made under 25 CFR 117.8, which provides:

Upon written application of an adult [Osage] Indian, the superintendent may disburse not to exceed \$10,000 from the surplus funds of such Indian for the purchase of land, the title to which has been examined and accepted by the special attorney for the Osage Indians or other legal officer designated by the Commissioner. In all cases title must be taken by deed containing a clause restricting alienation or encumbrance without the consent of the Secretary of the Interior or his authorized representative. [3/]

[1] Appellant contends that, because no criteria for evaluating applications are given in this section, the Area Director should have followed principles of trust law which require a trustee to preserve the trust property and make it productive. Since appellant sought to dispose of unproductive property and acquire productive property, appellant argues, the Area Director, acting under these principles, should have approved the acquisition.

The Area Director argues that "the federal protection extended to trust lands is in most respects identical to that extended to lands held by an individual with a restriction against alienation. In the absence of specific regulations, it was reasonable for [the Area Director] to use Part 151 as a reference" (Area Director's Brief at 3).

As the Area Director notes, trust and restricted fee lands have been treated alike for many purposes. See, e.g., Baker v. Muskogee Area Director, 19 IBIA 164, 175-76 n.9, 98 I.D. 5 n.9 (1991); Cohen's Handbook of Federal Indian Law (1982 ed.) at 615-18. See also 25 U.S.C. § 409a (1988), which authorizes acquisitions of land in restricted fee status as well as trust status. 4/ On its face, the analogy drawn by the Area Director appears reasonable.

3/ This provision apparently implements the Act of Feb. 27, 1925, 43 Stat. 1008.

4/ 25 U.S.C. § 409a (1988) provides:

"Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or any other Indian tribe is sold to any State, county,

Appellant suggests, however, that BIA either has a higher duty toward, or less discretion in connection with, Osage applicants under 25 CFR 117.8 than it has with respect to applicants under other land acquisition authorities. The basis for this contention, presumably, is that land acquisitions under section 117.8 are to be made with restricted funds. ^{5/} The acquisitions contemplated by 25 U.S.C. § 409a, however, also must be made with restricted funds, *i.e.*, funds derived from the sale of trust or restricted lands. 25 CFR 117.8 establishes no higher duty than does 25 U.S.C. § 409a. Nor is BIA's discretion under section 117.8 any more circumscribed than it is under 25 U.S.C. § 409a. Inasmuch as trust acquisitions under 25 U.S.C. § 409a are subject to 25 CFR Part 151, it is clear that at least some acquisitions made with restricted funds are, by regulation, subject to the criteria in 25 CFR 151.10.

Further, contrary to appellant's assumption, the fact that section 117.8 contains no criteria for evaluating acquisition requests means that the Area Director had broader, rather than narrower, discretion than would be the case if criteria were included in the regulation. By choosing to follow the criteria in 25 CFR 151.10, the Area Director actually put limits on his own discretion.

In explaining his decision to employ the criteria in Part 151, the Area Director noted that they are the "most readily available and familiar to applicants wishing to acquire land in trust or restricted status" (Area Director's Dec. 6, 1990, Decision at 2). Among other things, the December 6 decision served to put appellant on notice that the Area Director intended to follow the section 151.10 criteria and thus enabled her to prepare further submissions with that in mind.

fn. 4 (continued)

or municipality for public improvement purposes, or is acquired, under existing law, by any state, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or encumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance."

All further references to the United States Code are to the 1988 edition.

^{5/} Appellant argues:

"Land may be taken into trust for a tribe or individual under the [Indian Reorganization Act] or [the Oklahoma Indian Welfare Act] regardless of from where the money is derived and regardless of whether the applicant already owns the land. The approval of such an application is completely discretionary with the Secretary. Further, prior to the acquisition, the Secretary has no responsibility to the applicant. This is absolutely not the case when the acquisition is made under the special Osage statute" (Appellant's Opening Brief at 2).

The Board finds that, especially given the procedures followed in this case, the Area Director reasonably employed the criteria in 25 CFR 151.10 as guidelines in evaluating appellant's application.

Appellant next argues that the Area Director failed to consider all the factors in section 151.10. The administrative record shows that, contrary to appellant's contention, all factors were considered. See Mar. 5, 1991, memorandum of Supervisory Realty Specialist to Area Director at pages 3-4.

Appellant's final argument is that the Area Director incorrectly concluded, as a matter of law, that the Osage Reservation had been disestablished. Appellant bases this argument upon the Area Director's discussion of the criterion in section 151.10(f), "jurisdictional problems and potential conflicts of land use which may arise."

The Area Director stated:

[T]he question of law enforcement, and state and local jurisdiction over restricted and trust Indian lands is a major area of concern and potential conflict for the Muskogee Area. Conflicts involving land use and law enforcement jurisdiction on restricted Indian lands have already surfaced throughout Eastern Oklahoma, particularly in those cases involving tobacco sales, an activity [appellant] has indicated she may also conduct. [6/]

(Area Director's Mar. 8, 1991, Decision at 3).

Appellant appears to argue that the Area Director must have concluded the Osage Reservation had been disestablished, even though he did not so state, because jurisdictional conflicts can occur only on off-reservation lands. However, any assumption that such conflicts are limited to off-reservation areas is belied by the decades of litigation involving jurisdictional conflicts within Indian reservations. In any event, the Area Director was clearly making a factual statement, not a legal one. In light of previous and ongoing jurisdictional conflicts in Eastern Oklahoma, it was not unreasonable for him to conclude that similar conflicts might arise in appellant's case.

[2] The Board's role here is virtually identical to its role in reviewing BIA decisions concerning the acquisition of land in trust status. See, e.g., Eades v. Muskogee Area Director, 17 IBIA 198 (1989); City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989). In City of Eagle Butte, the Board observed that such decisions are committed to BIA's discretion and that the Board does not have jurisdiction to substitute its judgment for BIA's, although it does have authority to determine whether BIA gave proper consideration to all legal

6/ Appellant's attorney so stated at an Aug. 15, 1990, meeting of the Osage Tribal Council. Administrative Record, Tab 28 (excerpts of transcript of meeting at 2).

prerequisites to the exercise of its discretionary authority. 17 IBIA at 195-96, 96 I.D. at 330, and cases cited therein. Because of the lack of regulatory criteria here, the legal prerequisites are less specific. The Board concludes, however, that the Area Director's decision was reasonable and that he committed no legal error.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Muskogee Area Director's March 8, 1991, decision is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge